

**IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH, JAIPUR**

:: J U D G M E N T ::

D.B. CIVIL SPECIAL APPEAL (W) NO.746/2004

M/s. Shreyans Gems Pvt. Ltd.

Vs.

The Assistant Commissioner of Income Tax, Circle 2, Jaipur & Ors.

Date of Order :: 07th December, 2006

P R E S E N T

HON'BLE THE CHIEF JUSTICE SHRI S.N. JHA

HON'BLE SHRI JUSTICE P.S. ASOPA

::

Shri N.M. Ranka Sr. Advocate with
Shri Rajkumar Yadav for the appellant.
Shri Anuroop Singhi for the respondents.

BY THE COURT (PER HON'BLE THE CHIEF JUSTICE)

This special appeal is directed against the
order of the learned Single Judge dated 8.11.2004 in
S.B. Civil Writ Petition no.312/2004 dismissing the

writ petition of the appellant.

The appellant had filed the writ petition for quashing the notices dated 28/29.8.2003 and 15.12.2003 to pay 30% of the balance demand, and for other allied reliefs. The demand, it may be mentioned, had been raised pursuant to assessment of income tax for the assessment year 2000-01. Feeling aggrieved by the assessment, the appellant preferred appeal before the Commissioner of Income Tax. It also filed application before the Settlement Commission. The appellant was informed vide notice dated 28/29.8.2003 that it could pay 30% of the balance demand, that is, Rs.54,02,454, and rest of the demand may be kept in abeyance subject to payment of interest chargeable under the Income Tax Act, till disposal of the appeal. The appellant did not make the payment and recovery proceeding was initiated. At this stage, the appellant approached this Court seeking quashing of the impugned notices and stay of recovery.

The appellant had filed another writ petition being S.B. Civil Writ Petition no.3959/2004 against

the order by which its abovesaid settlement application had been rejected by the Settlement Commission in the meantime. The said writ petition too was dismissed along with writ petition no.312/2004 by a common order on 8.11.2004. It may be mentioned here that the appeal arising from writ petition no.3959/2004 being D.B. Civil Special Appeal no. 745/2004 was dismissed by the Division Bench on 10.10.2006. The order so far as it relates to writ petition no.3959/2004 thus stands affirmed.

It may also be mentioned that during pendency of this appeal, the appeal preferred by the appellant before the Commissioner of Income Tax against the assessment order was partly allowed on 24.12.2004. As a result of the appellate order, the liability of the appellant now comes to Rs.1,81,23,681, including interest, as on 28.9.2006. The appellant has filed second appeal before the Income Tax Appellate Tribunal (ITAT) which is still pending.

The case of the appellant is that in response to the notice dated 28/29.8.2003 it submitted reply on

12.12.2003 enclosing therewith balance sheet as on 31.3.2003 showing heavy losses and total share capital worth Rupees one lakh only. The appellant took the stand that there was no liquid asset available and the entire stock-in-trade had been seized and therefore it was not possible to pay even 30% of the demand, but disregarding its plea, arbitrarily, the recovery proceeding was initiated.

The appellant, it would appear, in effect and substance, seeks stay of the recovery of tax dues. In response to the observation of the Court that recovery of tax is not normally stayed in proceeding under Article 226 of the Constitution of India, counsel for the appellant placed reliance on a decision of the Supreme Court in *Income Tax Officer, Cannanore Vs. M.K. Mohammed Kunhi*, (1969) 71 ITR 815, and of this Court in *Maharana Shri Bhagwat Singhji of Mewar Vs. Income-Tax Appellate Tribunal, Jaipur Bench*, (1997) 223 ITR 192. The former is an authority on the point of stay of recovery of demand by the appellate authority under Section 254 of the Income Tax Act. In the latter case, though a learned Single Judge of this

Court stayed recovery of the estate duty till disposal of the appeal on a finding that the petitioner was not in a position to deposit 25% of the disputed duty, there is no discussion on the point whether in exercise of power of judicial review under Article 226 of the Constitution of India, the High Court should stay recovery of the demand and if so, in which circumstances and on what terms. It is well settled that a decision is an authority on the point decided, and not the consequences which may follow from the decision. Inasmuch as the point was neither raised nor canvassed or decided, we are unable to place any reliance on the decision.

Counsel also referred to KEC International Limited Vs. B.R. Balakrishnan, (2001) 251 ITR 158 and Jain Cycle Spares & Co. Vs. Commissioner of Income-Tax, (2004) 267 ITR 60. These decisions also do not lay down any principle on the point of stay of recovery of demand in revenue matters. As observed above, the mere fact that the Court stayed the recovery does not mean that the decision should be read as authority on the point. Unless the decision

lays down some rule or principle, it is to be understood as limited to the facts of the case and cannot therefore be cited as a precedent in other cases. We may observe in this connection that the fact that the Court or Authority has power to entertain the petition for grant of relief, as strenuously argued by the counsel for the appellant, does not mean that relief should be granted irrespective of consideration of the prima facie case, balance of convenience and the loss which the grant or denial of the desired relief may cause to the petitioner vis-à-vis the respondent. Undoubtedly, there is no restriction on the power of the High Court to grant relief including stay of recovery of the tax found due against the person aggrieved but if there is no restriction on the power, it only means that the power should be exercised with due circumspection.

Counsel also referred to Rajasthan Spinning and Weaving Mills Limited Vs. Additional Commissioner Commercial Taxes, (1991) 83 STC 181, Golem Momen Vs. Deputy Commissioner of Income-Tax, (2002) 256 ITR 754, Dredging Corporation of India Limited Vs. State of

Orissa, (1991) 82 STC 235 and Shiv Shakti Rubber and Chemical Works Vs. Income Tax Appellate Tribunal, (1995) 213 ITR 299. The decisions were cited on the point that the prayer should be dealt with by a reasoned order. According to counsel, the learned Single Judge did not assign cogent reasons in rejecting the prayer and the order therefore is fit to be set aside and the matter remitted back for fresh consideration. It was also submitted that in any case, in view of the circular of the Income Tax Department, the tax cannot be more than double the amount of tax on the returned income, and therefore the impugned demand is fit to be set aside on this ground alone.

In course of hearing, it transpired that on 20.11.2006, the ITAT stayed the auction proposed to be held on failure of the appellant to pay the demand - a fact not disclosed by counsel for the appellant in course of his arguments. This was brought to our notice by counsel for the Department. Counsel for the department further brought to our notice the fact that the prayer for stay had been rejected by the Division Bench in this appeal after hearing counsel for the

parties on 3.12.2004. According to the counsel, in view of the said order which was not challenged by the appellant, it is not permissible to consider the matter again. Counsel also submitted that the case of the appellant on merit is that Assessing Officer committed error in disbelieving its case of mixing of stock-in-trade. Counsel stated that this was specifically argued in Special Appeal no. 745/2004 arising from S.B. Civil Writ Petition no.3959/2004 and rejected vide order dated 10.10.2006. As regards the submission that in terms of the departmental circular the appellant is not supposedly required to pay more than double the amount of tax on the returned income, it was submitted that circular is applicable in proceedings before the Tax Recovery Officer, as held by the Andhra Pradesh High Court in I.V.R.

Constructions Limited Vs. Assistant Commissioner of Income-Tax, (1998) 231 ITR 519, and it is open to the appellant to urge this point before the Tribunal in second appeal which is pending. Counsel submitted that all said and done, the appellant is not entitled to any relief in the matter of stay of recovery of the demand in view of the law laid down by the Supreme

Court in the well known case of Assistant Collector of Central Excise Vs. Dunlop India Ltd., (1985) 154 ITR 172. The Tribunal having already stayed the auction, the prayer of the appellant in this appeal stands granted and the appeal has therefore become infructuous.

In reply it was submitted on behalf of the appellant that the appellant had no doubt made an application for stay of the demand in this appeal vide Stay Application no.73/2004 which was rejected on 3.12.2004 but the appellant is now challenging the correctness of the order of the learned Single Judge, and therefore while assailing the order of the learned Single Judge, he is entitled to challenge the action of the Department seeking to recover the demand. As regards stay by the ITAT vide order dated 20.11.2006, it was submitted that the stay is for a period of 180 days and therefore notwithstanding that the Tribunal has stayed the auction, the appellant is entitled to challenge the legality of the very demand of the Department and seek its stay.

After giving our anxious consideration to the submissions of counsel for the parties, we are of the view that submissions made on behalf of the Department must prevail over the rival submissions made on behalf of the appellant. We find force in the submission that by reason of the stay granted by the ITAT vide order dated 20.11.2004, the desired relief stands granted. It is true that the auction has been stayed only for a period of 180 days but as a matter of fact, stay cannot operate beyond that period as provided in the second proviso to sub-section (2A) of Section 254 of the Income Tax Act. However, in terms of the first proviso, where stay is granted, the appellate court is required to dispose of the appeal within a period of 180 days from the date of the order which means that in the instant case the appeal is likely to be disposed of within that period reckoned from 20.11.2006. For the sake of easy reference, sub-section (2A) alongwith the provisos may be quoted as under :-

“(2A) In every appeal, the Appellate Tribunal, where it is possible, may hear and decide such appeal within a period of four years from the end of the financial year in which such appeal is filed under sub-section (1) or sub-section (2) of section 253 :

Provided that where an order of stay is made in any proceedings relating to an appeal filed under sub-section (1) of section 253, the Appellate Tribunal shall dispose of the appeal within a period of one hundred and eighty days from the date of such order :

Provided further that if such appeal is not so disposed of within the period specified in the first proviso, the stay order shall stand vacated after the expiry of the said period."

It is true that in view of the second proviso, if the appeal is not disposed of within the period specified in the first proviso, that is, 180 days from the date of the stay order, the stay would stand vacated on expiry of that period, but having regard to the mandate contained in the first proviso that the Appellate Tribunal shall dispose of the appeal within a period of 180 days, there is no warrant for the argument at this stage that the appeal will not be disposed of within that period. The order of stay has been passed recently on 20.11.2006, and there is enough time for the Tribunal to dispose of the appeal, subject of course to co-operation by the appellant.

In any case, we are satisfied that recovery in revenue matters should not normally be stayed in a proceeding under Article 226 of the Constitution. In the case of Dunlop India Limited (supra), a three Judge Bench of the Supreme Court while deprecating the 'unwarranted' tendency to grant interim orders – for mere asking, laid down that the High Court should not as a rule in a proceeding under Article 226 of the Constitution grant any stay of recovery of tax except under very exceptional circumstances. Their Lordships observed that grant of stay in tax matters should be an exception and not a rule.

We have dealt with the judgments cited on behalf of the appellant. No decision to the contrary has been brought to our notice in which stay has been granted on a conscious consideration of the principles governing stay of recovery of revenue demand in a proceeding under Article 226 of the Constitution of India. The decision in Dunlop India Limited (supra), if we may say so, provides complete answer to the appellant's submission on the point of stay, and having regard to the law laid down therein, we are

unable to grant any relief to the appellant as prayed for.

In the result, we find no merit in this appeal which is accordingly dismissed.

[P.S. ASOPA], J.

[S.N. JHA], CJ.

Skant/-